IN THE

Supreme Court of the United States

October Term, 1963

No. 360

AMERICAN DIETAIDS CO., INC.,
Petitioner,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education and Welfare, EDWARD WARNER and CARL E. LORENTZSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	13
Appendix A	15
Appendix B	25

CASES CITED

Evers v. Dwyer, 358 U. S. 202 (1958)	7
Goldman v. United States, 316 U. S. 129	9
Lopez v. United States —— U. S. ——, 10 L. Ed. 2d 462, 83 Sup. Ct. —— (May 27, 1963)	6, 9
On Lee v. United States, 343 U. S. 747 (1952)	6, 9
Public Affairs Associates v. Rickover, 369 U. S. 111 (1962)	7
Silverman v. United States, 365 U. S. 505 (1951)	9

STATUTES CITED

	PAGE
28 U. S. C. 1254(1)	2
United States Constitution, Fourth Amendment	2, 4, 7
Federal Food, Drug and Cosmetic Act; Section 301(f) [21 U. S. C. 331 (f)]	3, 9
Federal Food Drug and Cosmetic Act, Section 303(a) [21 U. S. C. 333(a)]	3, 9
Federal Food, Drug and Cosmetic Act, Section 704(a) [21 U. S. C. 374(a)]	3, 4, 9, 10, 11, 12, 13

AUTHORITIES CITED

Borchard, Declaratory Judgment (2nd Edition, 1941), Pages 967, 966	7
Cong. Record, July 15, 1953	11
Cong. Record, July 16, 1953	12

IN THE

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OCTOBER TERM, 1963

No. .....

AMERICAN DIESAIDS CO., INC.,

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ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education and Welfare, EDWARD WARNER and CARL E. LORENTZSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 17, 1963.

Citations to Opinions Below

The opinion of the District Court is printed in Appendix A, *infra*, Page 15, and is officially reported at 215 F. Supp. 252.

The opinion of the Court of Appeals is printed in Appendix A, *infra*, Page 19 and is officially reported at 317 F. 2d 658.

Jurisdiction

The judgment of the Court of Appeals was entered on May 17, 1963 (Appendix A, *infra*, Page 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a declaratory judgment may be obtained with respect to the use of concealed tape recorders by government representatives which they have employed and are continuing to employ, as standard operating procedure, in violation of and beyond their statutory limitation of power and in violation of the Fourth Amendment to the United States Constitution.

2. Whether injunctive relief may be obtained to restrain government representatives from the continuing commission of acts which are beyond their statutory limitation of power and in violation of the Fourth Amendment to the United States Constitution.

3. Whether a tape recording surreptitiously made in petitioner's premises, in violation of the Federal Food, Drug and Cosmetic Act and of the Fourth Amendment to the United States Constitution, becomes government property with respect to which an action cannot be maintained without the government's consent.

4. Whether the use of concealed tape recorders in private business premises, as part of routine factory inspections, without a search warrant or court order, constitutes a violation of the Fourth Amendment to the United States Constitution.

5. Whether the use of concealed tape recorders in private business premises, as part of routine factory inspections, without a search warrant or court order, constitutes a violation of the Federal Food, Drug and Cosmetic Act.

Statutes Involved

The statutory provisions involved are Sections 301(f), 303(a) and 704(a) of the Federal Food, Drug and Cosmetic Act [21 U. S. C. 331(f), 333(a) and 374(a)]. They are printed in Appendix B, *infra*, Page 25.

Statement

The petitioner instituted the instant action for a declaratory judgment and injunctive relief. The complaint alleges that the respondents, Warner and Lorentzson, did improperly and without the knowledge or consent of petitioner, bring into and upon the petitioner's private business premises, a concealed tape recording device with which they recorded conversations of petitioner's employees, agents and representatives.

The said respondents, Warner and Lorentzson, are Inspectors of the Food and Drug Administration who gained entry into petitioner's premises under color of authority of the Federal Food, Drug and Cosmetic Act for the purported purpose of making a routine factory inspection.

The complaint alleges that the said respondents did bring into and upon the petitioner's private business premises, the said concealed tape recording device without any search warrant or other court order having been obtained therefor, and that respondents are continuing to

commit such acts as standard operating procedure, under an alleged claim of right pursuant to Section 704(a) of the Federal Food, Drug and Cosmetic Act [21 U. S. C. 374(a)].

It is alleged that the aforesaid acts and conduct of the respondents are violative of the Fourth Amendment to the Constitution as constituting an illegal search and seizure. As distinguished from prior decisions, we here find that the entry into petitioner's premises was not by consent, either express or implied, but was rather a compulsory entry for a limited purpose.

The complaint further charges that the said conduct and acts of the respondents constitute a violation of the Federal Food, Drug and Cosmetic Act, under color of which Act the respondents had gained entry into petitioner's business premises. Compulsory entry was obtained to petitioner's premises for a factory inspection which is supposed to be a matter of routine checking primarily as to sanitary and related conditions and which does not include the right to interrogate any persons or investigate any records or files of the petitioner.

The complaint requested the following relief:

a. That the said acts of the respondents be declared unauthorized by law and violative of Section 704(a) of the Federal Food, Drug and Cosmetic Act;

b. That the said acts of the respondents be declared an unlawful and improper interference with the petitioner's constitutional protection against illegal search and seizure as guaranteed by the Fourth Amendment to the United States Constitution;

c. An injunction to enjoin the respondents from engaging in or committing said acts, and

d. A mandatory injunction directing the respondents to turn over to petitioner the taped recordings made in petitioner's premises.

The respondents brought a motion for summary judgment in which none of the facts alleged in the complaint were denied.

The District Court dismissed the complaint on the ground that the action is not one which is appropriate for a declaratory judgment.

The Court of Appeals affirmed the judgment of the District Court. The Court of Appeals, however, held that in addition to the fact that declaratory relief is not appropriate herein, the injunctive relief requested, which would direct the respondents to turn over the tape recordings to the petitioner, is barred on the theory that sovereign immunity applies so as to bar any such action. The Court of Appeals apparently recognized that the ruling of the District Court, wherein it held that declaratory relief was not appropriate, did not cover that part of the action which requested injunctive relief.

Reasons for Granting the Writ

Petitioner respectfully submits that an important question is herein raised as to the right to obtain a declaratory judgment with respect to acts of government representatives which are alleged to be beyond their statutory power and in violation of the United States Constitution. If a declaratory judgment cannot be obtained with respect to such wrongful acts, which have been committed and are continuing to be committed, then it would necessarily follow that the constitutional rights of an individual could be violated each and every day without legal re-

course. Under such a doctrine the individual would be helpless against the destruction of all liberty and freedom.

Petitioner further urges that a significant question is presented with respect to the application of sovereign immunity as a bar to the instant action. Under the ruling laid down by the Court of Appeals, the action for a mandatory injunction was dismissed on the ground that the tape recordings, the very fruits of the wrong herein complained of, constitute government property with respect to which no action can be brought without the consent of the sovereign.

Petitioner respectfully further urges that an important constitutional question is herein raised relative to the use of concealed tape recorders in private business premises. The instant case presents facts distinguishable from those heretofore ruled upon by this Court in *On Lee* v. *United States*, 343 U. S. 747 (1952) and *Lopez* v. *United States*, ... U. S. ...., 10 L. Ed. 2d 462, 83 Sup. Ct. .... (May 27, 1963). Entry by the government agent in the instant case was not made with the consent of the petitioner, either express or implied. Entry was herein made by compulsory means.

Petitioner further urges that a very vital question of statutory construction is presented as to whether government agents may use concealed tape recorders as part of routine factory inspections. This question of statutory construction is of a special significance in view of the fact that such routine factory inspections are a continuing and regular function of the respondents which they conduct and must regularly conduct under the Statute.

Settlement of these questions involving both liberty and property is, therefore, in the public interest.

1. The Court of Appeals has ruled that declaratory relief cannot be obtained on the ground that no actual controversy now exists. The Court stated that there is no ground in such a single past incident for declaratory relief. The statements of the Court of Appeals are erroneous. These statements are made in the face of the instant record wherein it is alleged, without denial, that the acts complained of have been committed and are continuing to be committed as standard operating procedure.

In the instant case, we are not considering any possible threat or intention to commit the wrongful acts. We are here considering acts which have already been committed and which are continuing to be committed. Contrary to the Court of Appeals' statement, there is nothing here which is remote or speculative.

The instant case is one in which a declaratory judgment is especially appropriate. We are here considering acts of government representatives which are alleged to be beyond their statutory limitation of power and in violation of the Fourth Amendment to the United States Constitution. The simplest and best way to bring judicial determination of the challenged validity of government action which allegedly violates individual rights is by way of a declaratory judgment.

> *Borchard, Declaratory Judgment* (2nd Edition, 1941), Pages 967, 966.

See also *Evers* v. *Dwyer*, 358 U. S. 202 (1958), and the concurring opinion of Mr. Justice Douglas in *Public Affairs Associates* v. *Rickover*, 369 U. S. 111 (1962).

The instant ruling was made without a trial and upon a motion wherein the facts alleged in the complaint have not been denied. Insofar as the present record is concerned, the facts stand undisputed that the alleged wrong-

ful acts have been committed and are continuing to be committed. Under the ruling laid down by the Court of Appeals, the petitioner would have to wait until a civil or criminal action was brought in which there was an attempt to use the tape recordings. If this ruling is permitted to stand, then it follows that a government agent can continue to violate the individual's constitutional rights each and every day and the individual is without redress against the destruction of his constitutional liberty and freedom until such time as the government may institute an action against him in which it attempts to use evidence improperly obtained. There is no reason why legal redress cannot be obtained against a continuing wrong.

2. The Court of Appeals dismissed that part of the action which contains a request for a mandatory injunction directing the turnover to petitioner of the tape recordings made in petitioner's premises. The Court of Appeals held that the very tapes which were made in violation of the Statute, and in violation of the Constitution, constitute government property with respect to which sovereign immunity attaches. The very creation of this property arose out of the wrongful acts of the government agents. These tapes are the fruits of the wrong which was committed. The Court of Appeals has thus cloaked these wrongful acts in a mantle of immune and unreachable government property.

In invoking sovereign immunity, the Court of Appeals failed to consider the basic question inherent in the issue of whether sovereign immunity applies, as to whether the instant action involves acts of government representatives which are beyond their statutory power and in violation of the United States Constitution. Sovereign immunity does not apply under such circumstances.

3. The instant case presents for consideration another but different example of the use of concealed tape recording devices by government representatives. In the instant case, the respondents did not gain entry into petitioner's place of business with the consent or implied invitation of petitioner. The respondents gained entry into petitioner's business premises by compulsory means, by service of a notice of inspection under Section 704(a) of the Federal Food, Drug and Cosmetic Act. If petitioner refused entry he would be guilty of a criminal act [21 U. S. C. 331(f), 333(a)].

This fact is the significant distinction between the instant case and the case of *On Lee*, *supra*, wherein the government agent went into the place of business with the consent, if not by the implied invitation, of the petitioner in that case. This distinction similarly exists in the case of *Lopez* v. *United States*, *supra*.

This Court indicated in *Silverman* v. *United States*, 365 U. S. 505 (1961), that there was no physical encroachment within a constitutionally protected area in *On Lee*, *supra*, and *Goldman* v. *United States*, 316 U. S. 129. In the instant case, there has been an actual intrusion into petitioner's private premises. There has been an intrusion into a constitutionally protected area. A concealed tape recording device was physically brought into petitioner's premises.

No matter how desirable the ends may be, the acts of the government agents in this case raise a serious question as to whether they can be safely tolerated in a free society.

The use of newer and more refined types of electronic devices has created grave problems affecting our historical rights of privacy, liberty and freedom. If these in-

cursions upon our liberty are not restricted, the danger of making government the oppressor becomes a real and ominous one.

4. The question of statutory construction should be resolved herein as to the powers granted to government agents for entry into private premises under Section 704(a) of the Federal Food, Drug and Cosmetic Act.

Section 704(a) of the Federal Food, Drug and Cosmetic Act, as pertinent herein, provides as follows:

> "Sec. 704.(a) For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, services, or cosmetics are manufactured * * * and ~~(2) to~~ inspect, *at reasonable times* and *within reasonable limits* and *in a reasonable manner*, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein * * *." (Emphasis added.)

There is no question but that respondents have the right to make factory inspection. However, the issue herein is not whether they have the right to inspect the premises within the limits prescribed by Congress, but rather whether their acts in bringing into and employing in private business premises, a concealed tape recording device is consistent with, or a violation of their statutory power to inspect private premises within reasonable limits and in a reasonable manner.

The respondents were able to compel entry into private business premises by virtue of the express authority granted by Congress in Section 704(a) of the Act. This right of entry can be made without a warrant or court order for the purposes set forth by Congress. Congress was cognizant of the serious question involved, of permitting entry into private premises without a warrant or court order. The legislative history clearly indicates the intent of Congress to sharply circumscribe and restrict the right of entry and inspection which they granted in Section 704(a), when they stated that the right to inspect shall be "* * * at reasonable times, and within reasonable limits and in a reasonable manner * * *"

These terms were used by Congress as words of limitation. Thus, in the House debate, Congressman after Congressman reiterated the intended purpose of confining and restricting the right of inspection. For example, Congressman Younger stated:

> "It was done for the purpose of confining the inspection. Now it is up to the Food and Drug to see to it that their Inspectors are well trained and they do not go out on fishing expeditions into plants and factories, but that they perform an objective inspection and not go out on these punitive expeditions which we have heard so much about in our Committee hearings" (Cong. Record, July 15, 1953).

This same sentiment was repeated by numerous other Congressmen such as Congressman Harris who reiterated the reason for inserting the words reasonable manner, reasonable times and reasonable limits. Congressman Bennett similarly commented that the purpose of this language was to limit inspection and was to be strictly construed. He stated:

"Just one other thing. That language is directed to several things. This bill authorizes the inspector to go upon the factory premises. Then it provides what he may do when he gets on the premises, and that is the all-important thing here, in my judgment. He may, under this language, inspect the factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling thereon. Now, the intention of the committee, as is set forth on Page 7 of the committee report, was to make this a limited inspection and to strictly construe the language, 'factory, warehouse, pertinent, equipment, vehicle,' and so forth, so that the Food and Drug Administration could not construe such language to mean that they could go into the factory to inspect the owners' profit-and-loss statement, his complaint files, or to inspect files related to the qualifications of the people working for him, and many other similar things." (Cong. Record, July 16, 1953).

Congress carefully set forth the powers of inspection under Section 704(a). The right granted is merely to enter into a factory or warehouse, to inspect the physical plant, the products and labeling material, and nothing further. There was no power given to interrogate any employee or representative of a company. There was no power given to inspect the files of a company. Congress carved out a very limited and narrow right of entry into private premises for a very circumscribed inspection.

The acts of respondents herein constitute a clear violation of the Statute and the intent of Congress. Congress did not even grant the right to interrogate employees or representatives of the company, yet the respondents have proceeded to use the power to gain entry into private

business premises, to bring a concealed tape recording device into petitioner's premises to record statements and conversations of employees and representatives of petitioner.

In their affidavits submitted to the lower court, the respondents complained that the petitioner refused to disclose or furnish various data and records, such as financial information as to the volume of sales. This argument is difficult to understand since the respondent did not have the right to request or obtain such data or records as part of their factory inspection under Section 704(a) of the Statute.

It is respectfully submitted that the acts of the respondents herein, which they have committed and are continuing to commit as standard operating procedure, constitute a violation of the authority granted by the Statute and constitute acts which go beyond the statutory limitation of power granted by Congress.

Petitioner respectfully submits that this Court should rule upon and settle this question of statutory construction since it involves a regular and continuing activity of a government agency covering a broad area of our business community.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
Counsel for Petitioner.

Dated: August 9, 1963.

APPENDIX

APPENDIX A

OPINION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ. 3756

AMERICAN DIETAIDS CO., INC.,

Plaintiff,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education and Welfare, EDWARD WARNER and CARL E. LORENTZSON,

Defendants.

APPEARANCES:

BASS & FRIEND, Esqs., of New York, N. Y. Attorneys for Plaintiff. Milton A. Bass, Esq., of Counsel.

ROBERT M. MORGENTHAU, Esq., United States Attorney for the Southern District of New York. Attorney for Defendants. Anthony J. D'Auria, Esq., Assistant United States Attorney, of Counsel.

DAWSON, D. J.:

This is a motion by defendants, pursuant to Rule 56 of the Rules of Civil Procedure, for an order dismissing the complaint.

Appendix A

The action purports to be one for declaratory judgment pursuant to Section 1337, Title 28, U. S. C., declaring that certain acts of the defendants are unauthorized by law and in violation of the provisions of Section 704(a) of the Federal Food, Drug and Cosmetic Act, and for a declaration that they constitute an interference with plaintiff's rights against illegal search and seizure. The complaint also asks for an injunction.

The acts complained of may be summarized as follows:

The defendants Warner and Lorentzson are inspectors of the Federal Food and Drug Administration of the Department of Health, Education and Welfare. On or about August 9, 1962, these defendants presented to the plaintiff a notice of inspection to inspect the plant of plaintiff and were granted access to the premises. It is alleged in the complaint that they had a tape recording device with them, and

> "That said defendants Warner and Lorentzson, did thereupon carry said hidden and concealed tape recording device into and through plaintiff's business premises, wherein it was able to and did pick up and record statements and conversations of persons in plaintiff's business premises including agents, employees, and representatives of the plaintiff."

There is no indication that any proceeding, criminal or otherwise, is pending or that respondents are seeking to use or intending to use the tape recording referred to in the complaint.

It may be pointed out that the use of such hidden tape recording device is not a violation of the constitutional

prohibition against unreasonable search and seizure. *On Lee v. United States*, 343 U. S. 747 (1952); *United States v. Kabot*, 295 F. 2d 848 (2d Cir. 1961), *cert. denied*, 369 U. S. 803 (1962).

However, a more important issue is presented at the threshold. The facts alleged in the complaint do not present an issue for which declaratory judgment is an appropriate remedy. Plaintiff seeks a declaration that something done in the past was illegal. It does not contend that any present actual controversy exists. In order to get jurisdiction under the declaratory judgment statute it must be shown that the case involves what the statute calls an "actual controversy." Section 2201, Title 28, U. S. C. An actual controversy is one appropriate for legal determination. It must be definite and concrete. It must relate to the relations of parties having adverse interests. It differs from one that is academic or moot. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937).

Here there is no adversary proceeding seeking a determination of the legal rights of parties to a presently existing or contemplated controversy. Plaintiff is saying no more than that a wrong has been done in the past and it wants a declaration that these past acts constitute a wrong. This is not the function of an action for declaratory judgment. If a wrong has been done in the past plaintiff can sue to remedy that wrong. If plaintiff is afraid that the tape recording will be used in the future in a criminal proceeding not yet instituted, it has an adequate remedy at the time of the institution of suit by a motion to suppress.

If plaintiff is concerned lest similar acts take place in the future, the complaint is still not adequate. Circum-

stances may well be different in the future. Each such incident must be considered in the light of the facts of the incident. It is not proper to say that because a wrong was done plaintiff is entitled to a declaration that he should not be wronged in the future. Borchard, *Declaratory Judgment* (2d Ed.) p. 84.

The action is not one which is appropriate for declaratory judgment. The motion for summary judgment dismissing the complaint is granted. So ordered.

Dated: New York, N. Y.
March 22, 1963.

ARCHIE O. DAWSON
U. S. D. J.

Appendix A

OPINION.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 348—October Term, 1962.

Argued May 1, 1963. Decided May 17, 1963.

Docket No. 28130.

AMERICAN DIETAIDS CO., INC.,

Plaintiff-Appellant,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education and Welfare, EDWARD WARNER and CARL E. LORENTZSON,

Defendants-Appellees.

Before:

CLARK, SMITH and HAYS, *Circuit Judges*.

From a summary judgment dismissing a complaint for declaratory judgment and injunctive relief directed against the use of a concealed tape recorder by Food and Drug Administration inspectors, in the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, 215 F. Supp. 252, plaintiff appeals. Affirmed.

Appendix A

MILTON A. BASS of Bass & Friend, New York, N. Y., for plaintiff-appellant.

ANTHONY J. D'ATORIA, Asst. United States Attorney, Southern District of New York (Robert M. Morgenthau United States Attorney and David H. Hyde, Asst. United States Attorney, on the brief), for defendants-appellees.

SMITH, *Circuit Judge*:

Appellees Warner and Lorentzson, inspectors of the Food and Drug Administration of the United States Department of Health, Education and Welfare, pursuant to department policy, on August 9, 1962, carried with them a concealed tape recorder while inspecting under authority of § 704(a)[1] of the Federal Drug and Cosmetic Act, 21 U. S. C. § 374(a), the premises of plaintiff, a manufacturer of special purpose foods and allied products.

[1] § 374. Factory inspection; Right of agents to enter premises; notice; promptness

"(a) For purposes of enforcement of this chapter officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness."

Due to a malfunction of the recorder, plaintiff's representatives discovered its use and demanded that the tapes be surrendered, which was refused. Thereupon this action was commenced in the Southern District of New York against the Secretary of Health, Education and Welfare and the two inspectors, seeking a declaration that the acts of the inspectors were violative of the provisions of § 704(a) and of the Fourth Amendment's prohibition of illegal search and seizure, and seeking surrender of the tapes and injunction against "such acts". On defendants' motion, the Court, Archie O. Dawson, Judge, granted summary judgment dismissing the complaint. We hold that this action will not lie on the facts here established, and affirm the judgment.

Even though the government concedes that such use of recorders is in accord with department practice, there is no showing of any intention or threat again so to inspect plaintiff's premises. There is no ground in such a single past incident for declaratory relief against possible future inspections. There is no actual controversy now existing on which to found declaratory relief. Borchard, Declaratory Judgment (2d Ed. 1941), pp. 81-86. *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237 (1952); *Eccles* v. *People's Bank of Lakewood Village, Cal.*, 333 U. S. 426, 431. "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." Here we are not shown what use of the tapes, if any, may be intended. If a civil or criminal action should be brought and if claimed improper use of the tapes is then attempted, motion to discover or suppress the tapes may be appropriate. *On Lee* v. *United States*, 343 U. S. 747, 756 (1952). The courts are reluctant to decide important constitu-

tional questions at a stage of proceedings when the necessity of their resolution has not been established. *Poe* v. *Ullman*, 367 U. S. 497 (1961). Declaratory and injunctive relief were properly denied.

Nor do we reach the merits of the claim to possession of the tapes, upon whatever theory plaintiff may contend for such a right, for this is plainly an action against the sovereign, to which it has not consented. The tapes were recorded and retained by agents of the Secretary of Health, Education and Welfare in carrying out inspections authorized by the statute and pursuant to department policy. This is not an action to recover damages from defendants personally because of their personal actions. It seeks in this phase recovery of specific government property so that while nominally against the individuals it is in substance against the government over which the court, in the absence of consent, has no jurisdiction. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 688 (1949); *Dugan* v. *Rank*, — U. S. — April 15, 1963, 31 LW 4347.

The judgment dismissing the complaint is affirmed.

Appendix A

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of May one thousand nine hundred and sixty-three.

Present: HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

AMERICAN DIETAIDS CO., INC.,
Plaintiff-Appellant,

v.

ANTHONY J. CELEBREZZE, Secretary of the U. S. Department of Health, Education & Welfare, EDWARD WARNER & CARL E. LORENTZSON,
Defendants-Appellees.

Appeal from the United States District Court for the District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

(Filed May 17, 1963)

APPENDIX B

STATUTES

The Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301, *et seq.*), provides in pertinent part:

Sec. 301(f):

The following acts and the causing thereof are hereby prohibited:

The refusal to permit entry or inspection as authorized by section 704 [21 U. S. C. 331(f)].

Sec. 303(a):

Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine [21 U. S. C. 333(a)].

Sec. 704(a):

For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for

introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness [21 U. S. C. 374(a)].

BRIEF FOR THE RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 360

AMERICAN DIETAIDS CO., INC., PETITIONER

v.

ANTHONY J. CELEBREZZE, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, EDWARD WARNER, AND CARL E. LORENTZSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–22) is reported at 317 F. 2d 658. The opinion of the district court (Pet. 15–18) is reported at 215 F. Supp. 252.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1963. The petition for a writ of certiorari was filed on August 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a complaint alleging that Food and Drug Inspectors used a concealed tape recorder on

699-712—63

a single occasion during the course of a factory inspection provides sufficient basis for a declaratory judgment and injunctive relief where there is no threat of another inspection.

2. Whether the government may be directed to turn over the recorded tapes to the owner of the factory.

STATUTE INVOLVED

28 U.S.C. 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

In the Southern District of New York, petitioner, a manufacturer and distributor of special purpose foods and allied products, filed a complaint for a declaratory judgment, challenging the use of a tape recorder by inspectors of the Food and Drug Administration during the course of a factory inspection. It alleged that on August 9, 1962, the inspectors, Edward Warner and Carl E. Lorentzson, in making an inspection of its premises under the authority of the Food and Drug Act, carried a concealed tape recorder and made recordings of conversations on its premises under directions of the Secretary of

Health, Education and Welfare." As relief, petitioner sought a declaratory judgment that respondents' acts violated Section 704(a) of the Food and Drug Act and constituted an illegal search and seizure, and asked for an injunction restraining respondents from using recording devices without the knowledge or consent of petitioner. Petitioner also sought injunctive relief, directing that respondents turn over to petitioner the recordings obtained (R. 3–8).

Respondents moved for summary judgment with supporting affidavits. The submitted documents set forth that on August 9, 1962 (the day of the inspection) the inspectors identified themselves to Irvin L. Hubbard, petitioner's general manager, and displayed a written notice of inspection as required by 21 U.S.C. 704(a); that Inspector Warner, under authority of his superior, carried a miniature recording device in order to record accurately the extent to which petitioner would respond to inquiries and comply with the inspection; and that this was done because petitioner had been uncooperative on earlier inspections. Hubbard at first refused to admit them to the office section of the premises. He declined to disclose or furnish data as to the approximate annual volume of the company's sales and the percentage of its goods sold in interstate commerce; the identity of the printer of its promotional material; a specimen price list or listing of all products; distribution information pertaining to its products or literature; and the identity of the manufacturers of products sold by the firm. The inspection lasted approximately one hour and forty-five minutes. The affidavits acknowledged that Hubbard

discovered the recording device when it malfunctioned and that he demanded, without success, that the inspectors give him the device and the tapes which were subsequently forwarded to superior officials of the Administration.

Petitioner agreed that a summary judgment should be entered but claimed it should be in its favor (R. 19–21). The district court granted summary judgment for respondents, ruling that the case presented no "actual controversy" (Pet. 15–17). The court of appeals affirmed (Pet. 19–22).

ARGUMENT

1. Essentially, petitioner is seeking an advisory opinion that the act of the inspectors was unlawful. It has demonstrated no need for a declaration of its rights under the statute or for injunctive relief. There is no reason to suppose that the incident in question will be repeated. On the contrary, it appears that, since the date of the occurrence, the Secretary of Health, Education and Welfare has told Congress that, so far as factory inspections are concerned, Food and Drug Inspectors are now required to advise factory employees if a tape recorder is being used. H. Rep. No. 2464, 87th Cong., 2d Sess., pp. 14–15. The case was therefore properly dismissed as inappropriate for relief on the ground that there is no "actual controversy." See *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237. "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431.

2. Petitioner also claims a right to possession of the tapes held by the government. Not only is this in actuality, as the court of appeals found, a suit against the government which cannot be maintained without its consent, but petitioner has no legal right to obtain possession of the tapes. There is, we point out, no issue as to suppression, petitioner having disclaimed any interest in such an order (R. 20–21).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 360

AMERICAN DIETADS CO., INC.,
Petitioner,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education, and Welfare; EDWARD WARNER and CARL E. LORENTZSON,
Respondents.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The respondents' brief has set forth an erroneous statement of fact as the basis for its objection to the granting of certiorari. Thus, the respondents state on the bottom of Page 1 and the top of Page 2 of their brief that the alleged question presented is:

> "1. Whether a complaint alleging that Food and Drug Inspectors used a concealed tape recorder *on a single occasion* during the course of a factory inspection provides sufficient basis for a declaratory judgment and injunctive relief *where there is no threat of another inspection.*" (Italics added.)

Contrary to the respondents' assertion, the complaint does not allege the use of a concealed tape recorder on a *single occasion.* Rather, the complaint alleges that the respondents are continuing to commit such acts. The complaint further alleges that the respondents are continuing to commit such acts, under an alleged claim of right, as standard operating procedure as a part of plant inspections.

Thus Paragraph Seventeenth of the complaint alleges:

> "SEVENTEENTH: Upon information and belief that the defendants are continuing to commit such acts as hereinabove set forth under an alleged claim of right pursuant to Section 704(a) of the Federal Food, Drug and Cosmetic Act."

Paragraph Eleventh of the complaint further alleges, in relevant part, as follows:

> "ELEVENTH: * * * That defendants Warner and Lorentzson refused to turn over the tape to plaintiff, as demanded, and advised plaintiff that it was standard operating procedure to use such equipment as part of plant inspections."

These allegations of the complaint were never denied. These allegations stand admitted upon the record before this Court.

The respondents brought a motion for summary judgment in the District Court. Their affidavits did not deny the allegation, in the complaint, that they are continuing to commit the acts therein complained of. In matter of fact, the respondents not only admitted this allegation by their failure to deny same, but they actually impliedly affirmed the charge by arguing before the District Court that the use of concealed tape recorders was pursuant to official Government agency policy.

The statement by the respondents that the complaint alleges the use of a concealed tape recorder on a single occasion, where there is no threat of another inspection, is demonstrably untrue. The very fact that the respondents had to go to such lengths as to submit a false premise for its opposition herein, underscores the reason why certiorari should be granted.

On page 4 of their brief, the respondents argue that there is "no reason to suppose that the incident in question will be repeated". The respondents have attempted to employ conjecture as a substitute for facts. The complaint alleges that such acts are continuing. That allegation has not been denied in this record.

The respondents further argue on page 4 of their brief that the Secretary of Health, Education and Welfare has told Congress that they will no longer use concealed tape recorders in factory inspections. This reference is not a part of the instant record. It was never before the lower Courts for consideration and the petitioner never had an opportunity to respond to any such assertion.

Most significantly, however, summary judgment could not have been granted in the District Court if there was an issue of fact to be adjudicated. On the contrary, both parties agreed in the District Court that summary judgment should be granted because there were no issues of fact present. There were no issues of fact because the respondents did not deny the continuing commission of the acts alleged in the complaint.

Respectfully submitted,

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September 1963